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BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY; LESLIE WONG; MARY ANN BEGLEY; LUOLUO HONG; LAWRENCE BIRELLO; REGINALD PARSON; OSVALDO DEL VALLE; KENNETH MONTEIRO; BRIAN STUART; AND MARK JARAMILLA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JACOB MANDEL, et al.

Plaintiffs,

vs.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, SAN FRANCISCO STATE UNIVERSITY, et al.,

Defendants.

CASE NO. 3:17-cv-03511-WHO

REPLY IN SUPPORT OF MOTION BY DEFENDANTS BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY; LESLIE WONG; MARY ANN BEGLEY; LUOLUO HONG; LAWRENCE BIRELLO; REGINALD PARSON; OSVALDO DEL VALLE; KENNETH MONTEIRO; BRIAN STUART; AND MARK JARAMILLA TO DISMISS SECOND AMENDED COMPLAINT

Judge: Hon. William Orrick III
Dept: Courtroom 2, 17th Floor
Date: August 8, 2018
Time: 2:00 p.m.

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CONSTITUTIONAL PROVISIONS

I. INTRODUCTION

As Plaintiffs would have it, when a district court dismisses a complaint for failure to state a claim and the plaintiffs file an amended complaint, the defendants and the court, in considering that amended complaint, must start from scratch regardless of whether and to what extent it differs from the original. That is not the law. To the contrary, the law-of-the-case doctrine applies, and the amended complaint must be dismissed unless the plaintiffs show that it is materially different from the original in ways that cure the defects identified by the court. That is precisely the question addressed by Defendants' motion, but Plaintiffs do not even purport to address it. On that basis alone, Defendants' current motion should be granted.

In any event, the Second Amended Complaint ("SAC") does not cure any of the defects in the First Amended Complaint ("FAC"). As explained below, there are no new allegations that could justify this Court's departing from its prior rulings. Plaintiffs' having already amended their complaint twice in light of Defendants' arguments and this Court's rulings, the SAC should be dismissed without leave to amend.

II. ARGUMENT

A. The Law-of-the-Case Doctrine Governs This Motion.

Plaintiffs criticize Defendants for "blithely assert[ing] that the SAC is not materially different from the superseded FAC," and they contend that "arguments based on defects in superseded prior pleadings cannot demonstrate that the *current* pleading fails to state a claim for relief." Opp. at 1, 7. In fact, under black-letter law, the issue on this motion is *precisely* whether the SAC is materially different from the FAC such that it cures the defects in the FAC previously identified by the Court.

Under the law-of-the-case doctrine, "a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir.), *cert. denied*, 508 U.S. 951 (1993). The doctrine "posits that[,] when a court decides upon a rule of law, that decision should continue to govern the same issues in the subsequent stages in the same case" unless the decision "is clearly erroneous and would work a manifest injustice." *Arizona v. California*, 460 U.S. 605, 618 & n.8

(1983). A court has limited discretion to depart from the law of the case where: "(1) the first decision was clearly erroneous; (2) an intervening change in the law has occurred; (3) the evidence on remand [or subsequent motion] is substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result." *Thomas*, 983 F.2d at 155; *see also Johnson v. Holder*, 564 F.3d 95, 99-100 (2d Cir. 2009) (holding that "[court] may depart from the law of the case for 'cogent' or 'compelling' reasons including an intervening change in law, availability of new evidence, or 'the need to correct a clear error or prevent manifest injustice'"); *Neravetla v. Virginia Mason Med. Ctr.*, No. C 13-1501, 2014 WL 4094140, at *2 (W.D. Wash., August 18, 2014) (same) (quoting *AL Tech Specialty Steel Corp. v. Allegheny Int'l Credit Corp.*, 104 F.3d 601, 605 (3d Cir. 1997)). Where "none of the requisite conditions exists … failure to apply the doctrine of law of the case constitutes an abuse of discretion." *Thomas*, 983 F.2d at 155; *King v. Wang*, No. 2:14-cv-1817, 2017 WL 3188949, at *3 (E.D.Ca., July 27, 2017)

The law-of-the-case doctrine applies specifically where, as here, the plaintiffs file an amended complaint following a district court's granting of a motion to dismiss a prior complaint for failure to state a claim. *E.g.*, *Batson v. RIM San Antonio Acquisition, LLC*, No. 15-cv-07576, 2018 WL 1581675, at *5 (S.D.N.Y., Mar. 27, 2018); *White v. Wireman*, No. 1:16-CV-675, 2018 WL 1278588, at *7-8 (M.D.Pa., Feb. 8, 2018); *King*, 2017 WL 3188949, at *3; *Weslowski v. Zugibe*, 96 F. Supp. 3d 308, 316-17 (S.D.N.Y. 2015); *Neravetla*, 2014 WL 4094140, at *2-3; *Mitchell v. Skyline Homes*, No. CIV S-09-2241, 2010 WL 3784654, at *1 (E.D. Cal., Sept. 24, 2010). Under the doctrine, "*[c]ourts 'examine the Amended Complaint to determine whether plaintiffs have cured the former deficiencies*.'" *Batson*, 2018 WL 1581675, at *5 (quoting *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Young*, No. 91 Civ. 2923, 1996 WL 383135, at *1 (S.D.N.Y. July 9, 1996) (emphasis added)); *see also White*, 2018 WL 1278588, at *8 (holding that the court would "assess the legal sufficiency of [the claims in the amended complaint], judging their sufficiency against the benchmarks previously prescribed by the district court").

Thus, the question before the Court here is, as Defendants argue in their motion, whether the allegations in the SAC are *materially different* from those in the FAC such that they cure the

defects identified by the Court in dismissing the FAC. *See Batson*, 2018 WL 1581675 at *5 (addressing whether an amended complaint alleged "materially different" claims than the initial complaint); *King*, 2017 WL 3188949, at *3 (addressing whether allegations of amended complaint were "sufficiently different"); *Weslowski*, 96 F.Supp.3d at 316-17 (addressing whether allegations of amended complaint were "materially different") (quoting *Bellaza v. Holland*, No. 09 Civ. 8434, 2011 WL 2848141, at *3 (S.D.N.Y., July 12, 2011)); *McCready v. Mich. State Bar Standing Committee on Character and Fitness*, 926 F. Supp. 618, 621 (W.D. Mich. 1995) (applying law of the case where "[t]he amended claim does not … undermine the rationale of the earlier dismissal").

Plaintiffs do not even purport to address that question. Nowhere do they explain how any new allegations in the SAC cure the defects in the FAC identified by the Court.[1] Indeed, they do not even distinguish in their opposition brief between allegations that appeared in the FAC and those that are new in the SAC, combining those as if the distinction were of no consequence. Defendants, by contrast, have explained why the new allegations do not cure the defects identified by the Court. Where, as here, Plaintiffs have failed to make (or even purport to make) a showing demonstrating that the Court should depart from the law of the case, that doctrine mandates dismissal of the SAC. *See Selah v. N.Y.S.Docs Comm'r*, No. 04 Civ. 3273, 2006 WL 2051402, at *2 (S.D.N.Y. July 25, 2006) (dismissing amended complaint because the plaintiff failed to make a showing why the court should depart from law of the case); *see also Magnotti v. Crossroads Healthcare Mgmt. LLC*, No. 14-CV-6679, 2016 WL 3080801 at *2 (E.D.N.Y. May 27, 2016) (applying law of the case to amended complaint where "Defendants [whose prior motion had been denied] have not offered any reason for the Court to revisit its prior ruling"); *McCready*, 926 F. Supp. at 621 (applying law of the case to amended complaint where "Plaintiff has failed to persuade the Court that its earlier dismissal … was clearly erroneous").

The authorities relied upon by Plaintiffs to contest this well-established principle are inapposite. In *Ferdik v. Bonzelet*, 963 F.2d 1258 (9th Cir. 1992), the court merely held that

[1] Nor do Plaintiffs assert, as they could not, that any of this Court's legal rulings were clearly erroneous.

where, following dismissal of a first amended complaint, the plaintiff filed a second amended complaint in which all but one defendant was identified under the rubric, "et al.," the plaintiff could not rely on the dismissed complaint as sufficient identification of the defendants in the new complaint. *Id*. at 1260, 1262. In *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542 (9th Cir. 1990), the court similarly held that, with respect to whether a party was bound by a judgment, "[t]he fact that a party was named in the original complaint is irrelevant; an amended pleading supersedes the original." *Id*. at 1546. Neither case has anything whatsoever to do with application of the law-of-the-case doctrine to an amended complaint; nor do Plaintiffs' citations to the Wright & Miller treatise.

Nor do Plaintiffs' other cases about pleading standards assist them. In *Avalanche Funding, LLC v. Five Dot Cattle Co.*, No. 2:16-cv-02555, 2017 WL 6040293 (E.D. Cal. Dec. 6, 2017), there had been no prior dismissal of a complaint; the plaintiff voluntarily filed a first amended complaint, and the court correctly held that, in that context, "the burden is on the defendant to prove that the plaintiff failed to state a claim." *Id*. at *3. In *Concha v. London*, 62 F.3d 1493 (9th Cir. 1995), which predates the Supreme Court's pleading decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), there was again no law-of-the-case issue; the Ninth Circuit merely held that, in the particular context of a breach-of-fiduciary-duty claim, circumstances "may frequently defy particularized identification at the pleading stage," because "a fiduciary exercises discretionary control over a plan, and assumes the responsibilities that this control entails." 62 F.3d at 1503. And in *Soo Park v. Thompson*, 851 F.3d 910 (9th Cir. 2017), the court, citing *Concha*, applied a "relax[ed]" pleading standard to the plaintiff's claim that a police detective had surreptitiously intimidated and attempted to dissuade a witness from testifying on behalf of the plaintiff in an earlier criminal prosecution. *Id*. at 915, 928-29. Even assuming that *Concha* properly survives *Twombly* and *Iqbal,* no similar circumstances exist here and certainly none that would justify the extraordinary step of departing from the law of the case.

B. Plaintiffs' First Amendment Claims (1, 3, and 5) Should Be Dismissed.

1. This Court previously held that, "[f]or all of the First Amendment claims (which are expressly tied to the Barkat and KYR Fair events), the underlying allegations are that defendants took specific actions or refused to take specific actions that harmed plaintiffs *because of* plaintiffs' Jewish religion, ethnicity, or perceived pro-Israeli beliefs." Dkt. 124 at 17. The Court further held: "The First Amendment claims, therefore, are invidious discrimination claims. Plaintiffs have to allege defendants' *specific intent* to discriminate to state an official capacity claim; knowledge and mere supervisory responsibility will not suffice." *Id*. The Court cited *OSU Student Alliance v. Ray*, 699 F.3d 1053 (9th Cir. 2012), in support of its holdings. *Id*. And the Court expressly rejected Plaintiffs' current argument based on the *OSU* court's statement that "free speech violations do not require specific intent," 699 F.3d at 1074-75, holding "that discussion was tethered to the discussion of Free Speech Clause cases addressing express government regulations," not claims "that turn on invidious discrimination like the claims alleged here." Dkt. 124 at 23 n.10.

The Court then held that Plaintiffs had failed to allege such specific intent to discriminate on the part of Defendants with respect to either the Barkat event or the KYR Fair. Dkt. 124 at 19 ("What is lacking from the FAC are plausible allegations that the Administrative Defendants took those intentional acts or intentionally failed to act *because* of the content of the event's speech, the preferential content for the protectors' speech, or the views or religious beliefs of the attendees or organizers of the [Barkat] event."; *id*. at 23 ("Plaintiffs have failed to allege facts plausibly showing that any of the Administration Defendants took acts *because* of the content of plaintiffs' speech or views (or in preference for others') ….") (emphases in original).[2]

Plaintiffs fail even to argue, as they could not, that the Court's legal ruling—that the First Amendment claims are invidious discrimination claims and therefore require specific intent—was

[2] To the extent that Plaintiffs contend they have adequately alleged specific intent because they allege, conclusorily, that they were treated differently from others, *see, e.g.*, SAC ¶ 153, that contention fails for the reasons set forth in Section C.1 below, with respect to Plaintiffs equal protection claims.

clearly erroneous. That ruling remains law of the case.[3] Nor do Plaintiffs point to any new facts that would justify departure from the Court's ruling that they failed to allege specific intent to discriminate on the part of Defendants. They repeatedly emphasize their allegations about the "knowledge" by Defendants of alleged discrimination by others, *see, e.g.,* Opp. at 10 ("allegations that Defendants knew of the constitutional deprivations suffice"); *id*. at 11 ("mere knowledge suffices"); but, under the Court's prior rulings based on *OSU Student Alliance*, such knowledge is insufficient and specific intent is required.[4] *See* Dkt. 124 at 21 ("The allegations against Begley concern not her own affirmative decisions but her failure to force Hillel's participation or failure to cancel the event."); *id*. at 22 ("[S]imply having knowledge and failing to act will not suffice to impose personal liability on defendants in either an official capacity … or in a personal capacity."); *id*. at 22-23 ("[S]upervisors cannot be held liable simply because they knew of and failed to stop the invidious discrimination alleged.").

2. This Court also previously held, with respect to the Barkat event, that, "[s]ignificantly, plaintiffs are *not* alleging that the denial of a centrally located space for the Barkat event was pursuant to a policy or practice of SFSU to deny Jewish students and community members access to centrally-located space for events." Dkt. 124 at 18. Plaintiffs now allege an "unwritten, unannounced, never-before-enforced and entirely discretionary, standardless policy of moving 'controversial speakers' away from CCSC." SAC ¶ 60. They allege no facts whatsoever to support the existence of such a "policy" other than the fact that the Barkat event itself was not given a centrally located space.

[3] Plaintiffs do argue, puzzlingly, that the claims are based on "*admitted* viewpoint discrimination … not merely invidious discrimination." Opp. at 11; *see also id*. at 10 (SAC "now pleads viewpoint discrimination as opposed to invidious discrimination"). Putting aside that Defendants have never "admitted" viewpoint discrimination on their part, this Court's ruling, quoted above, correctly held that the claim was for invidious discrimination precisely *because* it involved alleged viewpoint discrimination.

[4] Plaintiffs cite to the entirely inapposite rule that, in the context of an Eighth Amendment claim against prison officials for cruel and unusual punishment, where a prisoner is subjected to "impending harm easily preventable," such as inhumane conditions or physical violence from others, "a failure of prison officials to act in such circumstances suggests that the officials actually wanted the prisoner to suffer the harm." *See Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995); *Del Raine v. Williford*, 32 F.3d 1024, 1038 (7th Cir. 1994). Plaintiffs cite no authority for application of that principle to the context of an event on a university campus.

Plaintiffs cite *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), for the proposition that "even a single decision by *such a body* unquestionably constitutes an act of official government policy … whether that action is to be taken only once or to be taken repeatedly." Opp. at 9 (citing *Pembaur*, 475 U.S. at 479) (emphasis added). The citation and (purported) quotation are extraordinarily misleading: what *Pembaur* actually states (on page 480, not 479) is this:

> [I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision *by its properly constituted legislative body*—whether or not *that body* had taken similar action in the past or intended to do so in the future—because even a single decision *by such a body* unquestionably constitutes an act of official government policy.

Id. 475 U.S. at 480 (emphases added). Here, of course, there is no alleged decision by any legislative body or any other final policymaking body within the University.

Plaintiffs assert that "the 'policy' alleged that survived a Motion to Dismiss in *OSU* … was similarly amorphous." Opp. at 9. In support, Plaintiffs quote from page 1060 of the *OSU* opinion to the effect that "[t]here is no specific written policy that governs the placement of publication bins, and none is required." Opp. at 9 (citing 699 F.3d at 1060). That quotation does appear on page 1060, but it comes from an email from the Associate General Counsel of OSU to the campus newspaper's editors, explaining that the policy in question was unwritten, not written. It is *not*, as Plaintiffs clearly imply, part of any holding or even statement by the Ninth Circuit. In *OSU*, it was undisputed that Oregon State University's Facilities Department had, and was enforcing selectively, "a 2006 University policy [unwritten but not "amorphous"] that prohibited newsbins in all but two designated campus locations, one near the bookstore and another by the student union." 699 F.3d at 1059.

3. This Court further emphasized that "[t]he heart of the allegations against the Administration Defendants related to the Barkat event is that defendants failed to enforce student code violations, stop the protests, or remove the protestors." Dkt. 124 at 19. Noting the *Felber v. Yudof* court's holding that "state actors have no constitutional obligation to prevent private actors from interfering with the constitutional rights of others," *id*. (quoting 851 F. Supp. 2d 1182, 1186

(N.D. Cal. 2011), this Court held it was "questionable whether a denial of association claim can be made based on the interruption and failure of the Administrator Defendants to handle the protestors in plaintiffs' preferred way (or even in a required way) for *one event*," *id*.

In a transparent effort to avoid, through artful pleading, this rule, Plaintiffs have now split apart and given their claims concerning the Barkat event two new names: the "Barkat Removal" claims and the "Barkat Shutdown" claims. The latter is obviously intended to imply, falsely, that the Administrator Defendants "shut down" the Barkat event, as opposed to merely failing to prevent others from interfering with the event—which is all that the factual allegations of the SAC support. They use the "shutdown" characterization continually throughout their opposition brief, apparently hoping that repetition will make it so. Based on this implicit distortion of the alleged facts, Plaintiffs rely on case law that governs the situation, not present here, where the government itself prohibits ("shuts down") or places restrictions on speech based on the reaction of the audience, frequently referred to as a "heckler's veto." *See Center for Bio-Ethical Reform, Inc. v. Los Angeles Cty. Sheriff Dep't.*, 533 F.3d 780, 787-88 (9th Cir. 2008) ("If the statute … would allow or disallow speech depending on the reaction of the audience, then the ordinance would run afoul of … a First Amendment-based ban on the 'heckler's veto.'"); *see also Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (striking down ordinance that assessed varying fees for assembling or parading based on the anticipated reactions by listeners' to the content of the ideas expressed). Plaintiffs would have this Court erroneously apply the "heckler's veto" prohibition to a situation where the government, through inaction, fails to prevent third parties from interfering with or "shutting down" a plaintiff's speech. That would be flatly inconsistent with the Court's prior ruling and the extensive case law on which it was based.

4. This Court also held, with respect to the Barkat event, that "cases discussing facial or as applied challenges to statutes, permit processes, and other policies that could 'reduce[] the size of a speaker's audience can constitute an invasion of a legally protected interest,' are inapposite." Dkt. 124 at 18 (citing *Benham v. City of Charlotte*, 635 F.3d 129, 130 (4th Cir. 2011)). Plaintiffs nevertheless argue that "an allegation that a venue change reduces the size of an audience pleads a cognizable First Amendment injury," citing *Benham*. Opp. at 4. Yet again,

Plaintiffs' citation is extraordinarily misleading. At issue in *Benham* was an ordinance that allowed "by-right" public assemblies, including certain demonstrations, in public spaces; required a permit for certain other public assemblies in the same locations; and gave a permitted assembly priority over a not-permitted one. 635 F.3d at 131-32. The plaintiffs, whose request for a permit was denied because their event did not fall within the category for which a permit was authorized, claimed they suffered injury from the ordinance because, lacking a permit, they might be "*displaced by a later-arriving group* that obtained a permit." *Id*. at 138 (emphasis added). The Fourth Circuit, although ultimately ruling against the plaintiffs, stated that "*such a displacement* might be cognizable constitutional injury" because "organizers must plan a by-right event [as opposed to a permitted event] knowing that it could be forced to *change venues at the last moment*," which "*last-minute changes* could decrease an event's turnout …." *Id*. (emphases added). As this Court has already recognized, the case has nothing to do with Plaintiffs' claims with respect to the Barkat event, and Plaintiffs' renewed reliance on the case certainly does not show the Court's decision was clearly erroneous.

C. Plaintiffs' Equal Protection Claims (2, 4, and 6) Should Be Dismissed.

1. This Court previously held that Plaintiffs' equal protection claim with respect to the Barkat event was deficient both (i) because "Plaintiffs fail to allege any facts showing that in materially similar circumstances—*i.e.*, events where speakers would likely draw protests and scheduled when classes were ongoing—other groups who are not identified as Jewish … were offered more centrally located or fee-free rooms," Dkt. 124 at 24, and (ii) because "[P]laintiffs fail to allege any facts that in materially similar circumstances—an open event where protestors had access, protestors started to disrupt the event, and protestors used prohibited amplification—the Administration Defendants present at the event acted differently," *id*.

Plaintiffs now assert that their equal protection claim concerning the Barkat event survives because they have added a few conclusory allegations to the SAC. Opp. at 18, citing SAC ¶¶ 63-64, 153-54. None of these, however, in any way undermines the basis for this Court's prior rulings. Paragraph 63 merely alleges that "[Defendants] did [not] identify any speaker or events in the past that were deemed 'controversial.'" SAC ¶ 63. Neither it nor paragraph 64 alleges that

there *was* any materially similar circumstance in which Defendants acted differently. Paragraphs 153 and 154 merely allege, respectively, that Defendants "appl[ied] differential treatment to Barkat Removal Plaintiffs" and that "no other events were banished to for-fee locales on the outskirts of campus based on concerns about controversial speakers drawing protest activities." SAC ¶¶ 153-54. Again, there is no factual allegation of any materially similar circumstance in which Defendants acted differently. Conclusory allegations of the sort made by Plaintiffs have repeatedly been held insufficient to support either an equal protection or a First Amendment viewpoint-discrimination claim. *See, e.g.*, *Ruston v. Town Bd. for Town of Skaneateles*, 610 F.3d 55, 59 (2d Cir. 2010) (holding equal protection claim failed, notwithstanding conclusory allegations, because "the [plaintiffs] do not allege *specific examples* of the Town's proceedings, let alone applications that were made by persons similarly situated") (emphasis added); *Moss v. U.S. Secret Service*, 572 F.3d 962, 971-72 (9th Cir. 2009) (holding viewpoint-discrimination claim failed because plaintiffs failed specifically to allege differential treatment of similarly situated groups); *Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1055 (9th Cir. 2004) (affirming dismissal where, "[a]side from conclusory allegations, [Plaintiff] has not identified other similarly situated property owners or alleged how they were treated differently"); *Weslowski*, 96 F. Supp. 3d at 319 (holding that "Plaintiff must plead that individuals with whom he is 'similarly situated in all material respects' … went undisciplined when engaged in conduct 'comparabl[y] serious [ ]' to his viewing of sexually explicit material") (citation omitted); *id*. at 320-21 (citing cases); *Friends of Roeding Park v. City of Fresno*, 848 F. Supp. 2d 1152, 1163 (E.D. Cal. 2012) (holding that "conclusory allegations that Defendants treated Plaintiffs differently from other similarly-situated individuals are insufficient").

The Ninth Circuit's opinion in *OSU* and Judge Chen's opinion in *Hightower v. City and County of San Francisco*, 77 F. Supp. 3d 867 (N.D. Cal. 2014), upon which Plaintiffs rely (*see* Opp. at 10-11) both support *Defendants'* position. In *OSU*, the plaintiffs specifically alleged that "[o]nly the newsbins of the *Liberty* were removed, not the newsbins of other papers the University did not control, such as the *Corvallis Gazette-Times*, *Eugene Weekly*, and *USA*

Today." 699 F.3d at 1065. In *Hightower*, Judge Chen held that, "[g]enerally, a plaintiff demonstrates an intentionally discriminatory action by reference to a 'control-group,' against which the plaintiff may contrast enforcement practices." 77 F. Supp. 3d at 883 (citing *Hoye v. City of Oakland*, 653 F.3d 835, 855 (9th Cir. 2011)); *see also* 77 F. Supp. 3d at 885 ("A discriminatory effect is typically established by showing the plaintiff was treated unfavorably compared to others who are similarly situated."). In *Hightower*, "Plaintiffs' complaint provide[d] *three different control groups*" who had, like the plaintiffs, engaged in publicly nude conduct at San Francisco events but who did not express the same viewpoint as the plaintiffs, and against whom the defendant did not enforce an ordinance as it had against the plaintiffs. *Id*. at 883-84 (emphasis added); *see also id*. at 885 ("Plaintiffs have alleged three different groups that engaged in publicly nude conduct, that were treated favorably by the SFPD—*e.g.*, the SFPD did not issue citations to members of those groups."). No remotely comparable specific facts about materially similar circumstances are alleged in the SAC here.

2. This Court dismissed Plaintiffs' equal protection claim with respect to the KYR Fair in part because, as with their First Amendment claim, they failed to allege specific intent to discriminate on the part of the Administrator Defendants. Dkt. 124 at 25-26 ("there are no facts alleged … that [the Administrator Defendants] acted with the specific intent to deprive the Student Plaintiffs of their equal protection rights because of their Jewish identity"). For the same reasons set forth in Sections B.1 and C.1 above, Plaintiffs have still failed to allege specific intent to discriminate on the part of Defendants.

D. Plaintiffs' Title VI Claims (7 and 8) Should Be Dismissed.

1. This Court held that Plaintiffs' Title VI claim based on direct discrimination suffered from "the same defects" the Court identified with respect to Plaintiffs' First Amendment and Equal Protection claims. The only new allegations Plaintiffs identify with respect to purported "direct discrimination" (*see* Opp. at 12) are two wholly conclusory allegations (SAC ¶¶ 206, 222) about the "anti-normalization mandate of the [boycott, divestment, and sanctions] movement (*id*. ¶¶ 36-40), an alleged comparison of Mayor Barkat to "a member of the KKK or Nazi party" (*id*. ¶ 88), Defendant Birello's alleged admission that he had forgotten to click

"approve" in the SFSU system to grant permits to Hillel (*id*. ¶ 108), and President Wong's alleged ambiguous but later clarified comment about whether Zionists were welcome at SFSU (*id*. ¶ 111; *see also id*. ¶ 130). None of these allegations—many of which relate to speech protected by the First Amendment that CSU could neither punish nor prohibit—supports a claim of direct discrimination under Title VI.

2. This Court further held that Plaintiffs had failed "to allege facts showing they were denied educational benefits." Dkt. 124 at 32. The Court held that the Barkat event and the KYR Fair event did not "equate to an actionable deprivation of educational opportunities." *Id*. And the Court held that none of the individual plaintiff students had provided "sufficient details to plausibly show a concrete, negative effect on his education." *Id*. at 33. In their opposition, Plaintiffs wrongly assert they are not required to plead "specific facts" concerning interference with their education, again citing the superseded pleading standard of *Swierkiewicz*. This Court has already held, consistent with *Twombly* and *Iqbal*, that plaintiffs must plead sufficient details to make a plausible showing and that the FAC failed to do so.

Plaintiffs point to various paragraphs of the SAC as purportedly showing interference with their educations, without differentiating between allegations that appeared in the FAC and that this Court has already held insufficient and allegations that are new to the SAC. Those that are even arguably both new and related to purported deprivation of educational benefits include allegations: about unspecified "threats" against unidentified Jewish and Israeli students (SAC ¶ 3); that Ms. Ben-David was provided a separate room in which to take her final exam in order to avoid Mr. Hammad (¶ 47); that Mr. Hammad was seen on campus by unidentified (but allegedly "terrified") Jewish and Israeli students (¶ 49); that plaintiff Mandel was subjected to a "hateful stare down" from a GUPS member in class (¶ 90); that three Jewish groups lost days of tabling and recruiting at the New Student Recruitment Fair (Plaintiffs do not allege how this interfered with any student's education) (¶ 108); and that unidentified Jewish and Israeli students have been "excluded from, discriminated against, or proactively decided to self-censor" in various *extra-curricular* campus events (¶ 130). None of these allegations, singly or together, warrant departure from this Court's holding that Plaintiffs have failed to allege a "concrete, negative

effect on [plaintiffs'] ability to receive an education." *Davis Next Friend La Shonda v. Monroe Cty. Bd. of Educ. (Davis)*, 526 U.S. 629, 654 (1999).

3. This Court also held that, under controlling Supreme Court and Ninth Circuit authorities, in order to plead "deliberate indifference" under Title VI, a plaintiff must show that "the [University] made an 'official decision … not to remedy the violation," and "this decision must be clearly unreasonable." Dkt. 124 at 30 (quoting *Davis*, 526 U.S. at 641; *Doe v. Willits Unified Sch. Dist.*, 473 F. App'x. 775, 775-76 (9th Cir. 2012); and *Oden v. Northern Marianas College*, 440 F.3d 1085, 1089 (9th Cir. 2006)). In an effort to lessen their pleading burden, Plaintiffs rely on a Ninth Circuit decision—*Monteiro v. Tempe Union High School Dist.*, 158 F.3d 1022 (9th Cir. 1998)—that predates the Supreme Court's decision in *Davis*, which was itself a pleading case. 526 U.S, at 633. To the extent *Monteiro* suggests that a plaintiff need not plead facts sufficient to show "an official decision … not to remedy the violation" that was "clearly unreasonable," it has been superseded by *Davis* and subsequent Ninth Circuit authority. Because Plaintiffs still have not alleged facts sufficient to show such an official decision—to the contrary, the facts alleged in the SAC, like those in the FAC, "appear to show the Entity Defendants' responses were objectively reasonable," Dkt. 124 at 32—the SAC fails to state a Title VI claim.

Plaintiffs also mistakenly rely on *Swierkiewicz v. Soreman, N.A.*, 534 U.S. 506 (2002), for the proposition that " 'specific facts are not required' to plead discrimination at the pleading stage." Opp. at 22 (citing 534 U.S. at 510-11). The quoted language does not appear in *Swierkiewicz*; what the Court there held was that, in a Title VII case, a plaintiff need not plead facts establishing a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Moreover, *Swierkiewicz* predated *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which created a "more demanding" pleading standard for all federal court complaints compared to the "more lenient" rule that had been applied in *Swierkiewicz*. *See Eclectic Properties East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014) (noting this "shift in the Supreme Court's analysis of Rule 8 pleading standards"); *see also McLeary-Evans v. Maryland Dept. of Transp. State Highway Admin.*, 780 F.3d 582, 586-87 (4th Cir. 2015) (holding that "*Swierkiewicz* … applied a more lenient pleading standard than

the plausible-claim standard now required by *Twombly* and *Iqbal*); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (holding that *Swierkiewicz* has been "specifically repudiated" by *Twombly* and *Iqbal* "insofar as it concerns pleading requirements").

Plaintiffs point to new paragraphs 129 and 130 of the SAC in support of their deliberate indifference argument. In those paragraphs, however, Plaintiffs acknowledge that "the University's own commissioned investigation of the KYRF incident [found] that Hillel was intentionally excluded"; that in September 2017 CSU created both a Working Group on Campus Climate and a Task Force on Anti-Semitism; that President Wong "revers[ed] his [alleged] previous position that Zionists were not necessarily welcome on campus"; and that the President asked that Professor Abdulhadi's offensive post be removed and stated that her opinion could not be expressed "in a way that implies university endorsement or association." SAC ¶ ¶ 129-30. While Plaintiffs may have wanted more or different responses, these allegations further demonstrate that Defendants did not make an official decision not to remedy the alleged hostile environment. *See* Dkt. 124 at 31 ("An aggrieved party is not entitled to the precise remedy that he or she would prefer." (quoting *Oden*, 440 F.3d at 1089)); *id.* (crediting Defendants' "broader steps to address the shutdown of Barkat event and anti-Semitism at SFSU in general," notwithstanding Plaintiffs' characterization of them as "disingenuous").

The core of Plaintiffs' argument that they have sufficiently pleaded a Title VI claim is their assertion that "[t]he SAC's allegations of repeated statements by students, faculty, and administrators and graffiti that 'Zionists are not welcome,' SAC ¶¶ 130-31, easily meets this low bar [under *Swierkiewicz*]." Opp. at 22. Of course, the bar is higher than *Swierkiewicz* suggests. Moreover, as this Court previously held, "Defendants … did not have the authority to prevent or stop the protestors' free speech rights to protest." Dkt. 124 at 31. Plaintiffs cite no authority, new or otherwise, for the proposition that a university has authority consistent with the First Amendment to either prohibit students, faculty, or administrators from making statements such as "Zionists are not welcome" or to discipline them for doing so.

Plaintiffs' reliance on *Monteiro* with respect to deliberate indifference is misplaced for at least two reasons. First, *Monteiro* involved an allegedly hostile environment at a public high

school, not a university. The *Davis* Court expressly stated that "[a] university might not … be expected to exercise the same degree of control over its students that a grade school would enjoy." *Davis*, 526 U.S. at 649; *see Benefield v. Bd. of Tr. of the Univ. of Alabama at Birmingham*, 214 F. Supp. 2d 1212 (N.D. Ala. 2002) (distinguishing Title IX obligations of universities and high schools). Moreover, under the First Amendment, universities have considerably less leeway than K-12 schools to regulate the extracurricular speech of their students. *See Brown v. Li*, 308 F.3d 939, 949 (9th Cir. 2002); *Kyriacou v. Peralta Community College Dist.*, No. C 08-4630, 2009 WL 890887, at *4 n.4 (N.D. Cal. Mar. 31, 2009); *College Republicans at SFSU v. Reed*, 523 F. Supp. 2d 1005, 1014-16 (N.D. Cal. 2007). Two district court cases upon which Plaintiffs rely—*T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332 (S.D.N.Y. 2014), and *Farley, Piazza & Associates v. Gladstone Sch. Dist.*, No. 3:10-cv-01172, 2012 WL 2049173 (D. Or. June 6, 2012)—are inapposite because they, like *Monteiro*, involved K-12 schools. Second, the *Monteiro* court held that the school district had "'a legal duty to take reasonable steps to eliminate' a racially hostile environment." 158 F.3d at 1034. The *Davis* Court expressly held that the test for deliberate indifference "is *not* a mere 'reasonableness' standard." 526 U.S. at 649.

E. Plaintiffs' Claims Should Be Dismissed Without Leave to Amend.

This is Plaintiffs' *third* attempt to plead adequate claims: after Defendants filed a motion to dismiss the original Complaint, identifying the very deficiencies subsequently found by the Court in the FAC, Plaintiffs voluntarily amended; after this Court dismissed the FAC, Plaintiffs again attempted in the SAC to cure the defects identified by the Court. Plaintiffs have had more than sufficient time in which to address those defects. *See Cafasso, United States ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011) ("The district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint.")

III. Conclusion

Defendants respectfully submit that the Court should dismiss all of Plaintiffs' claims without leave to amend.

DATED: June 27, 2018

Respectfully submitted,

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